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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS HERRERA-VILLATE, Defendant and Appellant.	B195347 (Los Angeles County Super. Ct. No. MA028652)

APPEAL from a judgment of the Superior Court of Los Angeles County, Brian C. Yep, Judge. Affirmed.

David D. Carico, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Chung L. Mar and Susan Sullivan Pithey, Deputy Attorneys General, for Plaintiff and Respondent.

Carlos Manuel Herrera-Villate appeals from the judgment entered following his convictions by jury on five counts of lewd act upon a child (Pen. Code, § 288, subd. (a); counts 1, 4, 6, 8, & 10), two counts of aggravated sexual assault of a child (Pen. Code, § 269, former subd. (a)(4)[1]; counts 2 & 7), attempted sodomy of a person under 14 years old and more than 10 years younger than appellant (Pen. Code, §§ 664, 286, subd. (c)(1), as a lesser included offense of count 3 - sodomy of a child under 14 years old and more than 10 years younger than appellant), count 5 - forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1)), attempted sexual penetration by a foreign object (Pen. Code, §§ 664, 289, subd. (j), as a lesser included offense of count 9 - sexual penetration by a foreign object), and count 11 – oral copulation of a person under 14 years old and more than 10 years younger than appellant (Pen. Code, § 288a, subd. (c)(1)), with a finding under the One Strike Law (Pen. Code, § 667.61, subd. (b)). The court sentenced appellant to prison for 60 years to life, plus 14 years.[2] We affirm the judgment.

FACTUAL SUMMARY

1. *Pertinent Facts.*

The offenses at issue occurred between April 2003 and March 2004, and involved two sisters, the stepchildren of the son of appellant. Both sisters were under 14 years old at the time of the offenses. One sister was older than the other, and both have the same initials. We will refer to the older sister, younger sister, and their mother as victim No. 1, victim No. 2, and mother, respectively, to protect their anonymity.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which as to appellant's convictions on counts 1, 4, and 5, and as to his conviction for attempted sodomy of a person under 14 years old and more than 10 years younger than appellant (the lesser

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[1] Penal Code section 269, subdivision (a)(4), read the same in 2003 and 2004. Subsequent references to the subdivision are to it as it read in those years.

[2] On January 12, 2009, appellant filed a request that this court take judicial notice of two sets of documents discussed *infra*. Respondent filed no opposition. We grant appellant's request.

offense of count 3), is not disputed, established that between April 2003 and March 2004, appellant, who was more than 10 years older than victim No. 1, committed two lewd acts upon her (counts 1 & 4). Appellant also attempted to sodomize her, and committed a forcible lewd act upon her (count 5). The People presented evidence establishing that appellant committed aggravated sexual assault as to victim No. 1 (count 2), i.e., forcible oral copulation involving a person under 14 years old and more than 10 years younger than appellant.

The evidence, the sufficiency of which as to appellant's convictions on counts 6, 8, and 10, and as to his conviction for attempted sexual penetration by a foreign object (the lesser offense of count 9), is not disputed, established that between the above dates, appellant, who was more than 10 years older than victim No. 2, committed three lewd acts upon her (counts 6, 8, & 10). Appellant also attempted to sexually penetrate victim No. 2 by a foreign object. The People presented evidence establishing that, as to victim No. 2, appellant committed aggravated sexual assault (count 7), i.e., forcible oral copulation involving a person under 14 years old and more than 10 years younger than appellant, and oral copulation involving a person under 14 years old and more than 10 years younger than appellant (count 11). In defense, appellant presented medical and other evidence disputing the sexual acts occurred.

We will present below additional facts where pertinent.

CONTENTIONS

Appellant claims (1) the trial court's exclusion of evidence pertaining to a temporary restraining order violated his due process right to present a defense, (2) the subject matter of a nurse's testimony was improper and relied upon improper matter, (3) appellant was denied effective assistance of counsel by his trial counsel's failure to introduce at trial evidence of appellant's mental disorder, (4) appellant was erroneously convicted on counts 6, 8, and 10, because no evidence as to these counts was presented at the preliminary hearing, (5) Judicial Council of California Criminal Jury Instructions (2006) CALCRIM No. 1080 erroneously indicates that slight contact, and not penetration, constitutes oral copulation, (6) his convictions on counts 7 and 11 are not

supported by sufficient evidence, (7) he was denied effective assistance of counsel by his trial counsel's failure to request modification of CALCRIM No. 1080, (8) the modified CALCRIM No. 1123 given to the jury violated his rights to due process and to a jury trial, and (9) he was denied effective assistance of counsel at sentencing.

DISCUSSION

1. *The Trial Court's Exclusion of Evidence Concerning the Temporary Restraining Order Did Not Violate Appellant's Right to Present a Defense.*

a. *Pertinent Facts.*

On September 12, 2006, prior to the presentation of evidence at trial, appellant made a motion in limine, proffering as evidence a temporary restraining order (hereafter, protective order) issued by a Los Angeles County Superior Court against the biological father of the sisters.[3] After argument on the motion, the court, which reviewed the protective order and related documents, indicated the order did not "involv[e] any of the parties to this case, either the victims or the defendant himself." The court ruled the documents were irrelevant, and excludable under Evidence Code section 352. We will present below additional facts where pertinent.

b. *Analysis.*

Appellant claims exclusion of the protective order violated his due process right to present a defense.[4] We reject appellant's claim. The protective order, inter alia, directed

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[3] One of the two sets of documents of which we take judicial notice (see fn. 2) is the court file in the case of *Duncan v. Davis, Jr.* (*Duncan v. Davis, Jr.* (Super. Ct. Los Angeles County, 2001, No. MD023850).)

[4] Appellant argues "The excluded evidence was relevant for a number of reasons. If the allegations against the biological father were false as the prosecutor and the Department of Social Services evidently believed because the girls were reunited with him, then the mother's false allegations were relevant to her credibility and to the motive, interest, and bias of the children . . . . If the allegations that the biological father abused the girls were true, then they were relevant to the level of sexual sophistication of the girls . . . and to the credibility of both the mother and the girls because each of them denied that they had ever been subjected to prior abuse by anyone other than the appellant. . . . [Los Angeles County Sheriff's Deputy Tania] Owen met with [victim No. 1] four or five times and [victim No. 1] denied that anyone other than the appellant

appellant to stay away from victim Nos. 1 and 2, and from mother. However, mother, who obtained the protective order, was not the victim in the present case. Even if any false allegations by mother were relevant to her credibility, appellant's motion failed to demonstrate that those allegations had a tendency in reason to prove the motive, interest, or bias of the children. In this regard, there was no dispute that only the mother supplied a declaration supporting the protective order. Although the protective order documents reflect mother alleged the children made various statements to her, appellant's motion failed to demonstrate the children were aware of any specific allegations later made by the mother in her supporting declaration. We also note the protective order was issued in 2001, and was based on misconduct alleged to have occurred as early as 1990.

Further, appellant conceded any abuse committed by the biological father was nonsexual. The motion referred to the alleged relevance of the nonsexual abuse to the issue of the sexual sophistication of the children. However, the motion did not demonstrate what appellant meant by sexual sophistication of the children (e.g., sexual sophistication generally, or sophistication concerning sexual abuse), any allegations of nonsexual abuse committed by the biological father had no tendency in reason to prove any such sexual sophistication, and the motion failed to demonstrate to what issue any such sophistication was material.

Appellant also appears to argue that evidence from the protective order that the biological father had abused the children impeached the mother's and childrens' denials to *deputies* that anyone other than appellant previously had abused the children. Appellant cites three pages of the reporter's transcript as reflecting those denials. We note appellant did not raise this issue below (but only the issue of denials to Wehr).

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had ever touched her in a manner she did not like." Notwithstanding appellant's arguments to the contrary, appellant's motion in limine failed to demonstrate that the children were reunited with their biological father, the prosecutor and Department of Social Services believed any allegations were false, or that any allegations, including any by mother, were false.

In any event, the pages of the reporter's transcript cited by appellant do not reflect mother made any statements to deputies; therefore, she did not, at the pages cited, make any impeachable statements. Moreover, even if statements mother made in the protective order to the effect that the biological father had abused the children impeached her denial to a deputy that anyone other than appellant had abused the children, appellant's motion failed to demonstrate that the mother's statements in the protective order had a tendency in reason to prove the lack of credibility of the children.

The pages of the reporter's transcript cited by appellant reflect victim No. 1 denied to a deputy that anyone other than appellant had touched victim No. 1 in a way she did not like, but the context of victim No. 1's denial was sexual abuse. The protective order was based on nonsexual abuse; therefore, the order had no tendency in reason to impeach victim No. 1's denial.

Finally, the pages cited by appellant do not reflect that victim No. 2 denied anything to a deputy. And even if victim No. 2 had denied to a deputy that anyone other than appellant had abused victim No. 2 in a nonsexual manner, the statements by mother in the protective order had no tendency in reason to prove the lack of credibility of victim No. 2.

We conclude the trial court did not abuse its discretion by excluding evidence concerning the protective order on the grounds such evidence was irrelevant and excludable under Evidence Code section 352. (Cf. *People v. Waidla* (2000) 22 Cal.4th 690, 717, 723-725; Evid. Code, §§ 210, 352.) Accordingly, we also conclude exclusion of that evidence did not violate appellant's right to present a defense, since the application of ordinary rules of evidence does not violate a defendant's constitutional right to present evidence. (Cf. *People v. Mincey* (1992) 2 Cal.4th 408, 440.) None of the cases cited by appellant, including *People v. Scholl* (1964) 225 Cal.App.2d 558, compels a contrary conclusion. (See *People v. Foss* (2007) 155 Cal.App.4th 113, 123-124.)

2. *The Testimony of the Sexual Assault Expert Was Admissible.*

a. *Pertinent Facts.*

Prior to trial, the court indicated appellant had requested a "402 hearing" as to whether Wehr, a nurse, qualified as a sexual assault expert. Appellant conceded Wehr was a nurse and agreed that if the prosecutor supplied the CV, that should resolve the issue.

During trial, the court indicated it possessed Wehr's CV. The prosecutor indicated Wehr previously had qualified as an expert, the prosecutor had used Wehr as an expert on three occasions, and one of those occasions occurred during the previous year. The court concluded it did not need to conduct a "402 hearing" concerning Wehr's qualifications as an expert.

At the 2006 trial, Wehr testified during direct examination by the People as follows. Wehr was the clinical director for the Center for Vulnerable Families at the High Desert Health System (Center) in Lancaster. The Center examined children who were suspected victims of physical or sexual abuse, or neglect. Wehr had a Masters Degree in ambulatory care nursing from the University of California at Los Angeles and postgraduate training at the University of Southern California (USC) through Dr. Astrid Hager's family violence clinic. The clinic treated many abused children.

Wehr was a nurse providing primary health care, and had been such since 1990. Wehr had other medical degrees. She was a registered nurse, and had an Associate Degree from Antelope Valley College and a Bachelor's Degree from California State University at Los Angeles.

As a nurse, Wehr had performed over a thousand sexual exams on children. The children were suspected victims of sexual abuse, physical abuse, or neglect. At least 60 to 70 percent of the exams were conducted on children who were suspected victims of sexual abuse. Wehr had training, experience, or education in conducting sexual assault exams. She trained at the USC violence intervention program through Dr. Hager's program. Hager was a world-renowned expert in child abuse. Wehr had attended the

"multiple training" San Diego child abuse conference yearly from about 1998 to 2005. Wehr had taken other courses relating to physical and sexual abuse of children.

Wehr had participated in training others on how to conduct sexual assault exams on children. In this regard, she had trained physicians and nurses, and local social workers, in sexual and physical abuse. She had made presentations for purposes of continuing medical education at the Center. Wehr had testified about 15 times in Los Angeles County Superior Court in child sexual assault cases.

During direct examination, Wehr testified that, based on her interview with victim No. 2 and victim No. 2's physical examination, Wehr's findings during the physical examination were consistent with her interview with victim No. 2, during which victim No. 2 described what had happened to her.

Wehr also testified that before she examined victim No. 1, Wehr conversed with her. In light of the deep cleft at the 7:00 o'clock position in victim No. 1's hymen and the injuries to her posterior fourchette, Wehr felt the cleft was due to sexual assault.

During redirect examination concerning victim No. 1, the prosecutor asked why Wehr had checked on a form " 'highly suspected' " instead of " 'definite evidence of sexual abuse or sexual conduct.' " Wehr testified she attempted to be conservative.

The following later occurred: "[Wehr:] The other thing, I wanted to get a second opinion on this case. It was a very serious case in which two children were involved with long-term chronic abuse, and the injuries to the posterior fourchette normally would heal a little faster than what we saw in this case, and I wanted to - - I assumed that it must have been a fairly deep injury to the posterior fourchette, and I wanted to get a second opinion from another examiner, and so I spoke to Dr. Lynne Ticson at U.S.C., and I transmitted the photos to her to get an opinion from her on the posterior fourchette, and she agreed that - - [¶] [Appellant's Counsel]: Object. Hearsay as to any other person. [¶] [The Court]: Overruled. She's an expert. [¶] Go ahead. [¶] [Wehr]: She agreed that the injury was likely to be sexual assault, and she suggested that I follow the case and examine the child again and see if the injury - - what we thought was an injury healed completely, which it did."

b. *Analysis.*

Appellant claims the trial court was required to conduct, pursuant to Evidence Code section 402, a "preliminary fact hearing" on the issue of Wehr's qualifications as an expert. We disagree. (*People v. Hoyos* (2007) 41 Cal.4th 872, 897; cf. *People v. Smith* (2007) 40 Cal.4th 483, 516.)

Appellant suggests the trial court erred in determining Wehr was an expert. We disagree. In the present case, the court heard the prosecutor's proffer, including Wehr's CV and the prosecutor's representations. The proffer was sufficient to support the trial court's implied finding as to the existence of the preliminary fact of Wehr's qualifications as a sexual assault expert. (Cf. *People v. Hart* (1999) 20 Cal.4th 546, 649; Evid. Code, § 402.) The trial court did not abuse its discretion by concluding Wehr was an expert. (Cf. *People v. Singh* (1995) 37 Cal.App.4th 1343, 1377.) Moreover, Wehr's testimony at trial was more than ample to satisfy any earlier requisite preliminary fact showing. Any error concerning that showing was not prejudicial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Appellant, citing to various pages of the reporter's transcript, notes (1) Wehr's "opinion that the physical findings in her examinations of [victim Nos. 1 and 2] were consistent with their stories of sexual abuse," (2) Wehr's opinion that victim No. 1 had been sexually abused, and (3) Wehr's testimony that she confirmed her opinion with a well-known physician from USC. Appellant then argues "[t]hese opinions were beyond the scope of Nurse Wehr's expertise, and relied upon inadmissible matters." We disagree.

Wehr did not, at the pages cited by appellant, opine that the physical findings in Wehr's examination of *victim No. 1* were consistent with her story of sexual abuse. To this extent, we reject appellant's claim because the burden is on him to demonstrate error from the record. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102.)

Even if Wehr opined that the physical findings in her examinations of victim Nos. 1 and 2 were consistent with their stories of sexual abuse, that opinion as well as any opinion that victim No. 1 had been sexually abused exemplified routinely admitted expert

testimony from sexual assault nurses. (See *People v. Hatch* (2000) 22 Cal.4th 260, 265; *People v. Espinoza* (1992) 3 Cal.4th 806, 813; *In re Deon D.* (1989) 208 Cal.App.3d 953, 957.) Moreover, "it is settled by 'a long line of California decisions' that an expert medical witness is qualified 'to give an opinion of the cause of a particular injury on the basis of the expert's deduction from the appearance of the injury itself.' [Citation.]" (*People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1293.) Notwithstanding appellant's suggestions to the contrary, Wehr did not offer an opinion on appellant's guilt or innocence, or testify that a witness had been truthful.

Finally, "The rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 . . . ; Evid. Code, § 801, subd. (b) [an expert's opinion may be based on matter 'whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates'].)" (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209-1210.)

Wehr did not extensively testify concerning details of what Ticson told Wehr concerning Ticson's opinion, but testified to little more than the facts that Ticson agreed victim No. 1's injury was likely to be sexual assault, and Ticson thought an injury to victim No. 1 had healed completely. The trial court did not abuse its discretion by permitting Wehr's challenged testimony. (Cf. *People v. Waidla*, *supra*, 22 Cal.4th at p. 725.)

3. *Appellant Was Not Denied Effective Assistance of Counsel With Respect to Mental Disorder Evidence.*

a. *Pertinent Facts.*

During the proceedings below, issues arose concerning appellant's competence to stand trial. Pursuant to court order and Penal Code section 1368, various psychiatrists prepared reports discussing appellant's mental state.[5] Those reports are discussed below.

Dr. Jack Rothberg submitted a report dated July 11, 2005. The report, summarizing, stated, "[Appellant] is aware of the charges, understands the roles of the participants and the likely consequences if found guilty. I do believe that [appellant] is suffering from a delusional disorder, possibly schizophrenia. He was extremely well organized and articulate in some areas of his presentation, but in other areas became quite delusional. I do not doubt that he suffers from a psychotic disorder. . . . I do believe [appellant] has the capacity to cooperate with counsel in a rational manner even in the presence of lingering psychotic symptoms. . . . Overall, however, despite the psychosis, **I believe [appellant] is competent to stand trial.**" (Emphasis in the original.)

Dr. Kory Knapke submitted a report dated July 15, 2005. The report stated, "[t]he fact that the defendant denies feeling as if he suffers from any mental illness makes the issue of malingering very unlikely. . . . [¶] . . . [¶] . . . It was clear during this interview that even though the defendant may have experienced problems in the past with his mental status, he clearly understands the charges and proceedings against him. Even though I did not go into great detail about the events of the instant offense, he was able to rationally cooperate with me throughout my interview. . . . He was able to respond appropriately to all of my questions, and his thought processes were logical, linear, and coherent throughout the interview. Because of this, it is my opinion he would also be able to rationally cooperate with his attorney. Therefore, the defendant is competent to stand trial at the present time."

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5 The trial court's rulings in connection with the Penal Code section 1368 proceedings are not at issue in this appeal.

Dr. Gordon Plotkin submitted a report dated December 13, 2005. It stated appellant has a major mental disorder, and he was not currently competent. Regarding appellant's competency, the report said, "[appellant] has significant deficits regarding understanding the nature of the proceedings. He has difficulty understanding such simple terms such as plea bargains, routine legal rights, nature of the roles of participants, ability to confront accusers, and this is not even considering some of the more complex issues. In addition, he has significant delusions which will clearly cause him to edit and/or withhold data from his attorney, therefore, significantly impair his ability to interact with his attorney in preparing his defense. Therefore, we clearly see that he has deficits in both prongs of the competency assessment; that is, that he is unable to understand the nature of the proceedings and cannot cooperate with counsel."

Dr. Knapke submitted a report dated January 24, 2006. Knapke indicated in the report that his opinions as reflected in his July 2005 report remained unchanged.
Dr. Ronald Markman submitted a report dated February 17, 2006. In it, Markman stated, "Current mental status examination revealed him to be oriented, alert, cooperative and of normal intelligence with a good fund of knowledge and fundamental skills. Responses were relevant and coherent, memory and concentration were not impaired and affect was appropriate. He was cognizant of the charges and had an adequate understanding of courtroom procedures and the roles of various individuals, [i.e.,] judge[,] prosecutor[,] and defense attorney. Affect was appropriate and he exhibited no evidence of a thought disorder or psychotic condition. Judgment was adequate, while insight into his condition was limited. [¶] Based on this evaluation, I would conclude that [appellant] is competent to stand trial within the meaning of Section 1368 P.C. He is oriented, appears adequately aware of the pending charges, is able to provide a narrative regarding the events leading to his arrest and has the ability to cooperate with counsel in a rational manner in his defense. He does not require psychiatric hospitalization at this time."

Evidence was presented at trial that appellant visited the school which victim Nos. 1 and 2 attended. Appellant, talking to an adult assistant in the school's health office, asked when girls typically began their menstrual cycles. Appellant told the assistant that

victim No. 1 recently had been to a doctor for an infection and she had been bleeding. He also told the assistant that victim No. 1 was having sex with some male, she was always messing around with appellant, and "[victim No. 1] always put her mouth on [appellant's] penis." He also told the assistant that victim Nos. 1 and 2 were always lying. A third sister testified that on one occasion, appellant, while folding clothes in the room of victim Nos. 1 and 2, was sniffing the crotch area of the two girls' panties. He claimed to the third sister that he did so to determine if the panties were dirty.

b. *Analysis.*

Appellant claims he received ineffective assistance of counsel because his trial counsel failed to present evidence of appellant's mental disorder. Appellant argues the evidence was relevant for three reasons: "(1) to show that his bizarre conversation with the health aide was the product of a mental disorder; (2) to rebut the prosecution's claim that his conduct toward the girls such as appearing in their room late at night, sniffing their clothes and making inappropriate comments and gestures toward them meant that he was sexually abusing the girls; and, (3) to support the defense that the girls wanted to get rid of appellant, not because he was sexually abusing them, but because he was psychotic and making their lives difficult." We disagree.

" 'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components.' [Citations.] 'First, the defendant must show that counsel's performance was deficient.' [Citations.] Specifically, he must establish that 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." (*Id*. at p. 217.) Moreover, on appeal, if the record sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, an ineffective assistance contention must be rejected. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

A reviewing court examining trial counsel's conduct in the face of an ineffective assistance claim "must in hindsight give great deference to counsel's tactical decisions. [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 703.) An ineffective assistance claim will be rejected on appeal unless there is a showing that there was no rational explanation for defense counsel's act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442.)

We have recited pertinent facts from the psychiatric reports. The record sheds no light on why counsel failed to act in the manner challenged, counsel was not asked for an explanation, and we cannot say on this record that there could not have been a satisfactory explanation. In fact, there is no dispute on appeal that appellant was sane at the time he committed the offenses and was competent to stand trial. Appellant's counsel reasonably could have refrained from presenting mental disorder evidence at trial as a tactical decision because he believed (1) the jury would reject the evidence, (2) the jury would reject it to the extent it was offered to exculpate appellant (in light of the evidence of appellant's guilt), (3) the jury would conclude appellant was mentally disordered *and* committed the offenses, and/or (4) it was more appropriate that the issue of any mental disorder of appellant be addressed at the sentencing hearing (Cal. Rules of Court, rules 4.409, 4.423(b)(2).) Appellant's ineffective assistance claim fails.

4. *The Jury Properly Convicted Appellant on Counts 6, 8, and 10 (as to Victim No. 2), Because Evidence of Those Offenses Was Presented at the Preliminary Hearing.*

a. *Pertinent Facts.*

(1) *The Preliminary Hearing Testimony.*

Counts 6, 8, and 10 pertain to victim No. 2. At appellant's preliminary hearing, Los Angeles County Sheriff's Deputy Tania Owen, assigned to the child abuse detail of the family crimes bureau, testified that victim No. 2, who was born in January 1995, told her the following. The first incident victim No. 2 recalled was she had been asleep in her bedroom when she awakened by appellant orally copulating her vagina. She hit appellant and he hit her back. On another occasion he had vaginal intercourse with her. After he ejaculated, he digitally penetrated her vagina.

The prosecutor asked if appellant ever had victim No. 2 orally copulate appellant. Owen replied yes, then testified, "She said that oftentimes after he put his penis into her vagina, he would put his penis on her mouth and rub her lips with it. She recalls one time that the penis got into her mouth[.]" One evening, victim No. 2 was asleep in her bedroom. Appellant entered the room and she awoke. Victim No. 2 said appellant put his penis inside her buttocks and he "was going up and down."

Victim No. 2's father told Owen the following. In August 2003, appellant moved from Van Nuys to Palmdale. In about October 2003, appellant came to the girls' home and would take care of them when the girls' parents were gone. From November 2003 through December 2003, appellant began spending the night at the girls' home more frequently. In January 2004, appellant began living there permanently. On April 2, 2004, appellant was arrested.

The prosecutor asked if Owen determined the amount of the contacts between appellant and victim No. 2, and the dates of the contacts. Owen testified "[victim No. 2] said it started before Christmas and it went through before [appellant] was . . . taken into custody. [*Sic*.] She said that [appellant] was in her bedroom almost daily. That's how she described it." Owen testified victim No. 2 used the term "every day."

The following then occurred: "Q And with regards to him being in her room every day, did she indicate there was sexual contact every day? [¶] A Yes. Either -- she described it as either he was orally copulating her or he would put his penis on her mouth."

(2) *The Allegations.*

Counts 6 and 10 of the second amended information alleged that, on or between April 1, 2003, and March 31, 2004, appellant committed a violation of Penal Code section 288, subdivision (a),[6] i.e., a lewd act upon victim No. 2. Said information alleged

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[6] Penal Code section 288, states, in relevant part, "(a) Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or

as count 8 that, on or between April 1, 2003, and March 31, 2004, appellant sodomized victim No. 2, a person under 14 years old and more than 10 years younger than appellant, in violation of Penal Code section 286, subdivision (c)(1).

On September 20, 2006, the court granted appellant's motion for judgment of acquittal as to count 8. The People then requested permission to amend count 8 to allege a violation of Penal Code section 288, subdivision (a). Appellant objected, inter alia, that that offense was already alleged in counts 6 and 10 and it "includes the same date." The court granted the People's request. The People later filed a third amended information alleging as to each of counts 6, 8, and 10, that appellant violated Penal Code section 288, subdivision (a). The jury convicted appellant on, inter alia, those three counts "as charged in . . . the Information."[7]

(3) *The Trial Testimony.*

At trial, evidence was presented that in 2003, victim No. 2 lived in Palmdale. Appellant lived in Van Nuys. Victim No. 2 occasionally visited appellant in Van Nuys. While there, appellant, using his hand, touched victim No. 2's buttocks and touched her "private place" between her legs. Sometimes he touched her inside her clothes, and other times he touched her outside her clothes. Appellant put his hand on victim No. 2's private place more than three times. He also digitally penetrated her vagina.

In late 2003, appellant moved to Antelope Valley and stayed with the family of victim Nos. 1 and 2. Appellant resumed touching victim No. 2. He touched her in her private part and touched her buttocks. He did so outside and inside her panties, and in the bathroom and bedroom. He digitally penetrated her more than three times.

School officials contacted Los Angeles County Sheriff's Deputy Dave Redding, who interviewed victim No. 2 on April 2, 2004. Victim No. 2 said appellant had sexually

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gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . ."

[7] Although the reporter's transcript and minute order for September 20, 2006 proceedings reflect the third amended information was filed, the third amended information is not part of the record before this court.

abused her. Victim No. 2 said the last incident occurred the preceding Sunday when appellant put his hand inside her shorts, but not inside her panties, and rubbed her buttocks. She went to her bedroom to get away but appellant followed her, put his hand down inside the front of her panties, and "put his pinky finger inside [victim No. 2]." Victim No. 2 said that, on one occasion, appellant entered her bedroom late at night and, while rubbing her vaginal area, asked her to let him go in there once.

On April 9, 2004, Owen interviewed victim No. 2, who told her as follows. Appellant had touched victim No. 2's lips, vagina, and buttocks. Owen testified that victim No. 2 said that, on one occasion, appellant rubbed his penis on her vagina, but did not put his penis inside her vagina. He ejaculated, then digitally penetrated her vagina. Victim No. 2 said there were several times when appellant rubbed his penis against her vagina, then made her orally copulate him. On another occasion, he entered victim No. 2.'s room and put his penis in her buttocks.

On April 26, 2004, Wehr testified during direct examination by the People that victim No. 2 said that victim No. 2 had been molested over a long period. Victim No. 2 also said the following. Appellant had touched her breasts, genitalia, and buttocks. Appellant put his "private in " victim No. 2's mouth many times. When victim No. 2 was sleeping, appellant would enter and put his "private" in her mouth, and he also put his "private" in her bottom.[8]

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[8] During opening argument, the prosecutor commented to the jury that each count had to be a separate act, "and you are free to choose." The prosecutor continued, "[t]here are *numerous* acts you can choose from[.]" (Italics added.) The prosecutor then stated, "But I would *suggest* the count 1, 288(a)," (italics added) and then discussed trial evidence pertinent to that count.

Later, the prosecutor commented that count 6 "*could* be [appellant's] hand down [victim No. 2's] panties." (Italics added.) The prosecutor commented concerning count 8, "*well, you have your choice of several things*. He was touching her anus. He was touching her vagina on numerous occasions, at least more than three[.]" (Italics added.) The prosecutor also said, "again count 10, another 288(a), she indicated he put his hand down her pants, both front and rear, on several occasions; so one of those *would* do it[.]" (Italics added.)

b. *Analysis.*

A defendant cannot be convicted of an offense not shown by evidence presented at the preliminary hearing, whether the offense was alleged in an original or amended information. (*People v. Burnett* (1999) 71 Cal.App.4th 151, 165, 177).

As mentioned, at the preliminary hearing, the following occurred during the direct examination of Owen: "Q And with regards to him being in her room every day, did [victim No. 2] indicate there was *sexual contact every day*? [¶] A Yes. Either -- she described *it* as either he was orally copulating her *or he would put his penis on her mouth.*" (Italics added.) Owen's preliminary hearing testimony thus provided evidence that appellant *frequently* put his penis *on* victim No.2's mouth during the period at issue.

At trial, Owen testified that victim No. 2 said there were *several times* when appellant rubbed his penis against her vagina, then made her *orally copulate him*. Similarly, Wehr testified at trial that victim No. 2 said that appellant put his "*private in* " victim No. 2's *mouth many times*, and when victim No. 2 *was sleeping*, appellant *would* enter and *put his "private in" her mouth*. The trial testimony of Owen and Wehr provided evidence that appellant put his penis *in* victim No. 2's mouth many times during the period at issue.

The testimony at trial that appellant put his penis *in* victim No. 2's mouth many times provided evidence that, when so doing, he put his penis *on* her mouth many times. Based on the trial testimony, therefore, appellant committed many offenses proscribed by Penal Code section 288, subdivision (a), based on his putting his penis on victim No. 2's mouth. The jury reasonably could have convicted appellant on counts 6, 8, and 10, based on three such offenses, respectively. Moreover, Owen testified at the preliminary hearing that appellant frequently put his penis on victim No.2's mouth. To the extent appellant was convicted as to counts 6, 8, and 10, based on three acts of putting his penis on victim No. 2's mouth, he was convicted of offenses shown by evidence presented at the preliminary hearing.[9]

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[9] We note the court gave the jury a unanimity instruction.

We conclude, therefore that, as to each of counts 6, 8, and 10, appellant was convicted of an offense, i.e., lewd act upon a child, shown by evidence presented at the preliminary hearing, i.e., evidence that appellant put his penis on victim No. 2's mouth.

Appellant claims the prosecutor, relying on other trial evidence, erroneously argued to the jury that appellant could be convicted of offenses not shown by evidence presented at the preliminary hearing and, therefore, appellant received ineffective assistance of counsel because his trial counsel failed to object to the prosecutor's argument. However, in light of our previous analysis, any constitutionally deficient representation by appellant's counsel in light of the prosecutor's comments to the jury (which arguably were at best suggestive, not declarative, see fn. 8) was not prejudicial; therefore, appellant was not denied effective assistance of counsel. (Cf. *People v. Ledesma, supra,* 43 Cal.3d at pp. 216-217.)

5. *The Court Did Not Err By Giving CALCRIM No. 1080 (Count 2 as to Victim No. 1; Counts 7 & 11 as to Victim No. 2)* .

a. *Pertinent Facts.*

Count 11 alleged appellant committed a violation of Penal Code section 288a, subdivision (c)(1) [10] against victim No. 2. One of the elements of that offense is that the defendant participate in an act of "oral copulation," a term defined in Penal Code section 288a, subdivision (a). The court gave the jury CALCRIM No. 1080. That instruction read, in pertinent part: "The defendant is charged in Count 11 with oral copulation of a person who was under the age of 14 and at least 10 years younger than the defendant. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant participated in an act of oral copulation with another person; [¶] AND [¶] 2. At the time of the act, the other person was under the age of 14 and was at least 10

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[10] Penal Code section 288a, subdivisions (a) and (c)(1), provide, in pertinent part: "(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person. [¶] . . . [¶] (c)(1) Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she shall be punished . . . ."

years younger than the defendant. [¶] *Oral copulation is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.*" (Italics added.)

Counts 2 and 7 alleged appellant committed a violation of Penal Code section 269, subdivision (a)(4)[11] against victim Nos. 1 and 2, respectively. One of the elements of that offense is that the defendant commit an act of oral copulation in violation of Penal Code section 288a. The court gave the jury CALCRIM No. 1123,[12] setting forth the elements of counts 2 and 7. That instruction defined oral copulation as did CALCRIM No. 1080, and stated penetration was not required.

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[11] Penal Code section 269, subdivision (a)(4), provides, "Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] . . . [¶] (4) Oral copulation, in violation of Section 288a, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person."

[12] That instruction read: "The defendant is charged in Counts 2 and 7 with aggravated sexual assault of a child who was under the age of 14 years and at least 10 years younger than the defendant. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed oral copulation with another person; [¶] AND [¶] 2. When the defendant acted, the other person was under the age of 14 years and was at least 10 years younger than the defendant; [¶] AND [¶] 3. The oral copulation was committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. [¶] To decide whether the defendant committed oral copulation with another person within the meaning of this offense, please refer to the attached instruction on oral copulation." The next instruction (which the parties assert is a modified version of CALCRIM No. 1015), read: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act of oral copulation with someone else; [¶] 2. The other person did not consent to the act; [¶] AND [¶] 3. The defendant accomplished the act by [force, violence, duress, menace, or fear of immediate and unlawful bodily injury to anyone.] [¶] *Oral copulation* is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required." The latter instruction also indicated that "[*d*]*uress*" meant "a direct or implied threat of force, violence, danger, hardship, or retribution . . . ." and "[*m*]*enace*" meant "a threat, statement, or act showing an intent to injure someone."

b. *Analysis.*

Appellant claims his convictions on counts 2, 7, and 11 must be reversed because CALCRIM No. 1080 erroneously indicated that slight contact is sufficient and penetration is not required.[13] We reject the claim.

CALCRIM No. 1080 pertained to count 11, not counts 2 and 7. In any event, the gravamen of appellant's complaint is that the court erroneously instructed the jury as to each of counts 2, 7, and 11, that, with respect to oral copulation in violation of Penal Code section 288a, slight contact is sufficient and penetration is not required. We reject the complaint.

For purposes of Penal Code section 288a, oral copulation is any contact, however slight**,** between the mouth of one person and the sexual organ of another person, and penetration of the mouth is not required. (Cf. *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1450, fn. 7; *People v. Hesslink* (1985) 167 Cal.App.3d 781, 791; *People v. Wilson* (1971) 20 Cal.App.3d 507, 510; *People v. Cline* (1969) 2 Cal.App.3d 989, 992, fn. 2; *People v. Harris* (1951) 108 Cal.App.2d 84, 88; see *People v. Panah* (2005) 35 Cal.4th 395, 489; *People v. Grim* (1992) 9 Cal.App.4th 1240, 1241-1243.) No violation of appellant's rights to due process or to a jury trial occurred. None of the cases cited by appellant compels a contrary conclusion.[14]

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[13] The second set of documents of which we take judicial notice (see fn. 2) is the legislative history of Assembly Bill No. 1024 as contained in appellant's request for judicial notice.

[14] Appellant also asserts "The judgment in Count 2 must also be reversed for insufficient evidence to support the conviction." We reject the assertion since it is perfunctory, and without supporting argument or authority. (Cf. *People v. Jones* (1998) 17 Cal.4th 279, 305.) Moreover, to the extent appellant is arguing there was insufficient evidence as to that count because there was insufficient evidence of penetration, penetration was not required.

6. *Sufficient Evidence Supported Appellant's Convictions on Counts 7 and 11 (Victim No. 2).*

Appellant claims there is insufficient evidence to support his convictions on counts 7 and 11, which pertain to victim No. 2. We disagree.

a. *Pertinent Facts.*

During the People's direct examination of victim No. 2, the prosecutor asked if she ever awoke in the night to find appellant in her bedroom. Victim No. 2 replied yes. The prosecutor asked what appellant would be doing. Victim No. 2 replied, "Trying to wake me up in the middle of the night" and later replied, ". . . or he would -- touching me." The prosecutor asked if victim No. 2 ever awoke at night to find appellant with his head between her legs. Victim No. 2 replied yes. Appellant had not taken her underwear off. Victim No. 2 did not remember what appellant was doing.

The prosecutor asked if appellant ever touched her "private place" with his mouth or tongue, and victim No. 2 replied, "Mouth." Appellant did not kiss victim No. 2 with his mouth "there." Appellant used his tongue. Victim No. 2 was not sure whether her underwear was on when appellant did this. When victim No. 2 found appellant doing this, she tried to get him off of her. She tried to hit appellant but he would say something back or hit her. This happened once or twice.

On April 9, 2004, Owen interviewed victim No. 2. During the People's direct examination of Owen, the prosecutor asked her what was the first thing victim No. 2 told Owen about touching that victim No. 2 did not like. Owen later replied that victim No. 2 remembered waking up to appellant being between her legs. Owen also testified that victim No. 2 said the following. Victim No. 2's underwear had been removed and appellant was "licking her vagina." Victim No. 2 tried to get appellant to stop, but he would not. Victim No. 2 would punch appellant and appellant would then turn and slap her. The prosecutor asked how many times this happened, and Owen replied that victim

No. 2 said it happened several times. Victim No. 2 could not recall specific times, but it happened more than once.[15]

b. *Analysis.*

As to count 7, as mentioned, the jury convicted appellant of violating Penal Code section 269, subdivision (a)(4), which we have quoted in pertinent part. (See fn. 11.) Appellant does not here dispute that he orally copulated victim No. 2, but argues, first, that the act was not "committed by force" for purposes of Penal Code section 269, subdivision (a)(4). We reject the argument.

"[O]ral copulation by force within the meaning of section 288a, subdivision (c)(2) is proven when a jury finds beyond a reasonable doubt that defendant accomplished an act of oral copulation by the use of force sufficient to overcome the victim's will." (*People v. Guido* (2005) 125 Cal.App.4th 566, 576.)

Victim No. 2 told Owen that victim No. 2's underwear had been removed and appellant was "licking her vagina." Victim No. 2 also told Owen that victim No. 2 tried to get appellant to stop, but he would not. Victim No. 2 would punch appellant and appellant would then turn and slap her. The jury reasonably could have concluded from the above that victim No. 2, by punching appellant, tried to get him to stop orally copulating her, but that she was unsuccessful because he slapped her and resumed the oral copulation. There was sufficient evidence that appellant orally copulated victim No. 2 by force.

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[15] On April 26, 2004, Wehr conducted a sexual assault examination on victim No. 2. Wehr testified during direct examination by the People that victim No. 2 told Wehr that victim No. 2 had been molested over a long period. Wehr also testified "she told me that [appellant] had been coming into her room and that he had told her that if she would let him lick her private that he would open a savings account for her, that she reminded him of his wife -- I don't know if it was his former wife or -- and that he had put his penis in her mouth. [¶] She said he put his private in her mouth many times, that when she was sleeping that he would come in and put his private in her mouth . . . ."

Second, appellant argues oral copulation requires skin-to-skin contact, and appellant's licking of victim No. 2's vaginal area through her underwear was insufficient evidence of oral copulation. We reject the argument.

We have doubts whether oral copulation requires skin-to-skin contact. We note such contact is not required for sodomy. (*People v. Ribera* (2005) 133 Cal.App.4th 81, 85-86.) However, even if oral copulation requires skin-to-skin contact, we note the prosecutor asked if victim No. 2 ever awoke at night to find appellant with his head between her legs. Victim No. 2 replied yes. Victim No. 2 testified appellant had not taken her underwear off. Victim No. 2 did not remember what appellant was doing. The jury reasonably could have understood this testimony to refer to the state of things at the time victim No. 2 awoke.

However, the prosecutor also asked if appellant ever touched her "private place" (see *People v. Harris*, *supra*, 108 Cal.App.2d at p. 88) with his mouth or tongue, and victim No. 2 replied, "Mouth." She testified appellant did not kiss victim No. 2 with his mouth "there." She also testified appellant used his tongue. Victim No. 2 was not sure whether her underwear was on when appellant did this. The jury reasonably could have understood this testimony to refer to events that occurred shortly after she awoke. Moreover, although victim No. 2 testified she was not sure whether her underwear was on when appellant did this, she did not then testify that appellant licked her vagina area through her underwear. The jury reasonably could have concluded that, even if her underwear were on, appellant simply moved it in order to put his tongue directly on victim No. 2's vagina.

Owen testified that victim No. 2 remembered waking up to appellant being between her legs. Owen also testified that victim No. 2 said her underwear had been removed and appellant was "licking her vagina." There was sufficient evidence of skin-to-skin oral copulation.

Third, appellant, claiming both Wehr and Owen testified victim No. 2 said she orally copulated appellant, argues victim No. 2's statements were hearsay and therefore

insufficient evidence. There is no need to reach the issue in light of our conclusion that there was substantial evidence that appellant orally copulated her.

Finally, appellant argues that victim No. 2's testimony that appellant orally copulated her " 'once or twice' " was insufficient evidence to support appellant's convictions on counts 7 and 11. We disagree. Victim No. 2 told Owen that appellant was "licking her vagina." Victim No. 2 tried to get appellant to stop, but he would not. Victim No. 2 would punch appellant and appellant would then turn and slap her. The prosecutor asked how many times this happened, and Owen replied that victim No. 2 said "it happened" several times. Victim No. 2 could not recall specific times, but it happened more than once. The jury reasonably could have concluded that when victim No. 2 said "it" happened several times, the antecedent was appellant's oral copulation of victim No. 2, not victim No. 2's punching of appellant and his slapping her. There was sufficient evidence supporting appellant's convictions on counts 7 and 11. (Cf. *People v. Ochoa, supra,* 6 Cal.4th at p. 1206.)

7. *Appellant Was Not Denied Effective Assistance of Counsel by His Trial Counsel's Failure to Request Modification of CALCRIM No. 1080.*

Appellant claims his trial counsel rendered ineffective assistance of counsel by failing to request that CALCRIM No. 1080 be modified to reflect that oral copulation required skin-to-skin contact. CALCRIM No. 1080 pertained to count 11, which alleged a violation of Penal Code section 288a, subdivision (c)(1) ; see part 5 of our Discussion. We reject appellant's claim.

The record sheds no light on why counsel allegedly failed to act in the manner challenged, appellant does not claim counsel was asked for an explanation for the alleged failing, and we cannot say there simply could have been no satisfactory explanation. Indeed, first, appellant's counsel reasonably might have concluded that oral copulation did not require skin-to-skin contact. (See *People v. Ribera, supra,* 133 Cal.App.4th at pp. 85-86.)

Second, "As a general rule, in the absence of a request for amplification, the language of a statute defining a crime . . . usually is an appropriate basis for an

instruction." (*People v. Rodriguez* (2002) 28 Cal.4th 543, 546.) CALCRIM No. 1080 did little more than use the statutory language of Penal Code section 288, subdivision (c)(1) to define the elements of that crime. Appellant's counsel reasonably could have concluded that the instruction was sufficient to apprise the jury of any skin-to-skin contact requirement. Third, we have discussed the pertinent facts concerning this offense. Appellant's counsel reasonably could have concluded there was ample evidence that appellant orally copulated victim No. 2 directly and not through her underwear. Appellant's ineffective assistance claim fails. (*People v. Slaughter, supra,* 27 Cal.4th at p. 1219.)

8. *The Court Did Not Err by Giving the Modified CALCRIM No. 1123 Instruction (Count 2 as to Victim No. 1; Count 7 as to Victim No. 2).*

As mentioned, the court gave to the jury CALCRIM No. 1123 (see fn. 12). The gravamen of appellant's present contention appears to be that the instruction erroneously indicates as to count 2, that his oral copulation of victim No. 1 could be committed by force against "another person," i.e., someone other than victim No. 1, and erroneously indicates as to count 7, that his oral copulation of victim No. 2 could be committed by force against "another person," i.e., someone other than victim No. 2. He suggests the instruction should have been modified to reflect that as to count 2, the requisite force had to be applied to victim No. 1 and, as to count 7, the requisite force had to be applied to victim No. 2. We conclude otherwise.

" ' "Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." [Citation.]' [Citations.]" (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.) The instruction generally tracked the statutory language. Appellant requested no clarifying language. He waived the issue.

Moreover, the premise of appellant's argument is that the instruction permitted the requisite "force" to be applied to "another person." However, given the punctuation and grammatical structure of the clause, "The oral copulation was committed by force,

violence, duress, menace, or *fear of* immediate and unlawful bodily *injury on the victim or another person*," the jury reasonably would have understood the instruction as requiring *force* against, and only against, the victim, but permitting *fear* of immediate and unlawful bodily injury on the victim *or* another person. Finally, there was no evidence as to count 2 that force was applied to someone other than victim No. 1, and no evidence as to count 7 that force was applied to someone other than victim No. 2. The alleged instructional error was harmless. (Cf. *People v. Watson, supra*, 46 Cal.2d at p. 836.)

9. *Appellant Was Not Denied Effective Assistance of Counsel At Sentencing.*

a. *Pertinent Facts.*

The preconviction probation report prepared for a May 2004 hearing reflects as an aggravating factor, inter alia, that the planning, sophistication, or professionalism with which the crime was carried out, or other facts, indicated premeditation (see Cal. Rules of Court, rule 4.421(a)(8)), and reflects as a mitigating factor that appellant had no prior criminal record (rule 4.423(b)(1)).

At sentencing in 2006, the court indicated it had read the probation report and the parties' sentencing memoranda, and had considered the evidence presented at trial and the verdicts. The court also stated that, for purposes of sentencing, the court "considered all of the applicable rules . . . and code sections" including Penal Code sections 1170, et seq., Penal Code section 667, et seq., and California Rules of Court, rules 4.425 (criteria affecting concurrent or consecutive sentencing) and 4.426 (violent sex crimes).

The court added that, "particularly with regard to sentencing the defendant concurrently or consecutively," the court would make the following findings: (1) the crimes involved multiple victims (victim Nos. 1 and 2), (2) as to each victim, appellant committed the crimes on separate occasions, and on some occasions in different locations (e.g., Van Nuys and Palmdale) (see Cal. Rules of Court, rule 4.425(a)(3)),[16] (3) the

[16] The court later added, "The crimes were committed at different times over the span of approximately one year in different places as previously stated; therefore, there was not a single period of aberrant behavior here[.]" (See Cal. Rules of Court, rule 4.425(a)(3).)

crimes and objectives were predominantly independent (see rule 4.425(a)(1)), the crimes involved separate acts of violence (rule 4.425(a)(2)), and the crimes were against separate victims, and were on separate occasions as to both victims (see rule 4.426(a)).

The court tentatively ruled it would sentence appellant to prison for 60 years to life, plus 14 years, as follows: consecutive terms of 15 years to life as to each of counts 1, 2, 6, and 7, a consecutive term of six years as to count 5, consecutive subordinate terms of two years as to each of counts 4, 8, 10, and 11, and two concurrent terms of three years for attempted sodomy of a person under 14 years old and more than 10 years younger than appellant (a lesser offense of count 3), and attempted sexual penetration by a foreign object (a lesser offense of count 9), respectively. After argument, the court imposed sentence as indicated in its tentative ruling.

b. *Analysis.*

Appellant claims he received ineffective assistance of counsel because his trial counsel failed to object to the trial court's alleged erroneous reliance upon three factors to impose the above consecutive sentences, and failed to argue appellant's alleged mental disorder as a mitigating factor supporting concurrent sentences. The three factors upon which the trial court erroneously relied, according to appellant, were the factors of multiple victims, independent crimes and objectives, and separate acts of violence. We reject appellant's claim.

The record sheds no light on why counsel allegedly failed to act in the manner challenged, appellant does not claim counsel was asked for an explanation for the alleged failing, and we cannot say there simply could have been no satisfactory explanation.

In fact, appellant's counsel reasonably could have believed the trial court properly relied on the aggravating fact that, as to each victim, appellant committed the crimes on separate occasions, and on some occasions in different locations. (Cf. Cal. Rules of

Court, rule 4.425(a)(3)).)[17] Appellant does not dispute that this was an available aggravating factor.

Moreover, appellant's counsel reasonably could have believed the trial court properly could have relied on the facts that the crimes and objectives were predominantly independent (cf. *People v. Coelho* (2001) 89 Cal.App.4th 861, 887-888; Cal. Rules of Court, rule 4.425(a)(1)), appellant was convicted of other crimes (as to counts 3 & 9) for which consecutive sentences could have been imposed but for which concurrent sentences were imposed (rule 4.421(a)(7)), and, as to at least some crimes, the manner in which the crime was carried out indicated planning (rule 4.421(a)(8)).

The court expressly stated it considered all applicable rules; those rules included California Rules of Court, rule 4.423(b)(2), which permitted court consideration of the fact that "The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime" as a mitigating factor. Moreover, the court is presumed to have considered all relevant sentencing criteria (rule 4.409), and appellant's counsel reasonably could have believed the court considered all relevant aggravating and mitigating factors. In light of the above, appellant's counsel also reasonably could have concluded that, even if the court had erred by relying on some aggravating factors, the court simply would have relied on proper aggravating factors to reach the same result if the matter had been brought to the attention of the court. (Cf. *People v. Watson, supra*, 46 Cal.2d at p. 836.) No ineffective assistance of counsel occurred.

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[17] California Rules of Court, rule 4.425(a)(3), lists as an aggravating factor, "The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior."

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.